

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-110791-001 DT
CR2010-137021-001 DT

06/01/2016

HON. SAM J. MYERS

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

SUSIE CHARBEL
ROBIN E BURGESS
JAMES ARTHUR EAVES

v.

VICTOR TED HERNANDEZ (001)

TAYLOR W FOX
NATALEE SEGAL
BRUCE C SMITH
BRANDON N COTTO

CAPITAL CASE MANAGER
JUDGE MCCOY

FINDINGS AND ORDERS / CAPITAL CASE:CR2010-137021-001

On May 18, 2016 the Court held a proceeding to address the Mandate and Decision Order filed 3/19/2015 in the Court of Appeals, Division One. At that hearing oral argument was presented regarding Defendant's Pre-Hearing Memorandum and Motion to Compel Disclosure of Capital Review Committee Materials and Information filed April 12, 2016. The Court stated that it would issue a separate minute entry addressing the legal and discovery issues and the scope of an evidentiary hearing contemplated by the Court of Appeals decision. This is that minute entry.

In its decision, the Court of Appeals concluded:

¶8 Under E.R. 1.9(a) and 1.11(c), Gadow was disqualified, at a minimum, from participating in the prosecution of the non-capital case. Because Hernandez's plea proposal included in the non-capital case, Gadow should have been screened from the Committee's consideration of the proposal regardless of whether the nature and content of his previous conversations with Hernandez disqualified him from participating in the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-110791-001 DT
CR2010-137021-001 DT

06/01/2016

prosecution of the capital case...Further proceedings are necessary to determine whether Gadow's participation in the Committee process that included consideration of Hernandez's non-capital case prejudiced Hernandez in the context of the capital case such that MCAO as a whole should be disqualified from prosecution...The state shall bear the burden to show that any confidential information conveyed to Gadow in the non-capital case did not affect the MCAO's decision to seek the death penalty in the capital case.

¶9 This decision does not imply that disqualification of the MCAO [Maricopa County Attorney's Office] will be required. If Gadow did not communicate to the Committee confidential information learned through his prior representation of Hernandez, and if Gadow's vote was not essential to the Committee's decision to recommend seeking the death penalty, imputed disqualification is not required. But on this record, we cannot say what, if any, effect the failure to screen Gadow had on the MCAO's prosecution of the capital case.....

Mandate and Decision Order filed 3/19/2015 at 3-4 (Citations omitted).

The Court of Appeals' decision affirms that in an evidentiary hearing to resolve the issues presented, the State will have the burden to prove that neither the information provided by Mr. Gadow nor the participation of Mr. Gadow had an effect on the Committee's decision.

The Court of Appeals directed that, as to the decision reached by the Committee in regard to the Defendant's plea proposal, the Court address two issues:

1. Whether Gadow communicated to the Committee confidential information learned through his prior representation of Hernandez; and
2. Whether Gadow's vote was *essential* to the Committee's decision (a) to recommend seeking the death penalty or (b) to recommend rejecting the plea proposals. (Emphasis added.)

The Court finds that resolving the first question, whether Mr. Gadow communicated confidential information, requires the testimony of Mr. Gadow.

The Court finds that resolving the second question, whether Mr. Gadow's vote was "essential" to the decision of the committee turns on the interpretation of that word. "Essential" could be interpreted as a *quantitative* inquiry (Could the decision of the committee to reject the plea proposal have been achieved without Mr. Gadow's vote or the vote of those who may have

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-110791-001 DT
CR2010-137021-001 DT

06/01/2016

been influenced by Gadow's vote?) or a *qualitative* inquiry (Did Mr. Gadow's vote affect the votes of other committee members, thus affecting the decision of the committee as a whole?). The Court finds that the Court of Appeals' directive requires that the Court make a quantitative and a qualitative determination as to whether, and if so to what extent, Mr. Gadow's vote (1) affected the Committee's decision and (2) influenced the votes of the other Committee members, quantitatively and qualitatively.

The Court finds that resolving the second question raised by the Court of Appeals requires the testimony of Mr. Gadow as well as other Committee members. The number of members that must testify depends on whether the Committee vote must be unanimous or requires only a simple majority.

Based on the above,

IT IS ORDERED that the State provide to Defendant any written materials that relate to (1) whether Mr. Gadow communicated confidential information and (2) whether Mr. Gadow's vote was essential to (i.e., influenced) the Committee's decision (a) to recommend seeking the death penalty or (b) to recommend rejecting the plea proposals.

IT IS FURTHER ORDERED that, at a minimum, the State provide to Defendant any written materials that Mr. Gadow either prepared or assisted in preparing that were distributed to Committee members in connection with its decision whether to accept or reject the Defendant's plea proposal. The State shall also provide any MCAO policies setting forth numerical voting standards for the Capital Review Committee.

IT IS FURTHER ORDERED granting Defendant's Pre-Hearing Memorandum and Motion to Compel Disclosure of Capital Review Committee Materials and Information to the extent that it is consistent with the above order, and denying the motion to the extent that it is inconsistent.

IT IS FURTHER ORDERED affirming the **Status Conference** in these matters set for **JUNE 21, 2016 at 9:00 a.m.** before the HON. SAM J. MYERS, SCT 5A.

LAST DAY REMAINS: 11/30/2016